Supreme Court, U.S.
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No. 90-1297

In the Supreme Court of the United States

OCTOBER TERM, 1990

WALTER R. WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to relief under 28 U.S.C. 2255 based on a claim of ineffective assistance of counsel that he failed to make in an earlier petition under 28 U.S.C. 2255.

2. Whether under 28 U.S.C. 2255 petitioner may challenge the sufficiency of evidence supporting his conviction for conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848, after unsuccessfully making that challenge on direct appeal.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

McCleskey v. *Zant*, No. 89-7024 (Apr. 16, 1991)	4, 5
Strickland v. *Washington*, 466 U.S. 668 (1984)	3-4
United States v. *Frady*, 456 U.S. 152 (1982)	3, 6
United States v. *Webster*, 639 F.2d 174 (4th Cir. 1981), cert. denied, 456 U.S. 935 (1982)	2, 6
Wainwright v. *Sykes*, 433 U.S. 72 (1977)	3

Constitution and statutes:

U.S. Const., Amend. VI	4
18 U.S.C. 1952(a)(3)	2
18 U.S.C. 1961	2
18 U.S.C. 1962(c)	2
18 U.S.C. 1963	2
21 U.S.C. 843(b)	2
21 U.S.C. 843(c)	2
21 U.S.C. 846	2
21 U.S.C. 848	2, 5, 6
28 U.S.C. 2255	2, 3, 4, 5, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 61a-63a) is unreported, but the decision is noted at 917 F.2d 1302 (Table). The opinion of the district court (Pet. App. 54a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1990. The petition for a writ of certiorari was filed on February 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of

conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848; racketeering, in violation of 18 U.S.C. 1961, 1962(c), and 1963; conspiring to distribute cocaine and heroin, in violation of 21 U.S.C. 846; using a telephone to facilitate narcotics violations, in violation of 21 U.S.C. 843(b) and (c); and travelling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to a total of 50 years' imprisonment.

The convictions arose out of petitioner's activities as the leader of a major drug distribution network in Baltimore, Maryland. Petitioner and co-defendant Norma Thompson operated a business known as the 1508 Club Tavern and Liquor Store that served as the headquarters of the drug distribution enterprise. *United States* v. *Webster*, 639 F.2d 174, 183 (4th Cir. 1981), cert. denied, 456 U.S. 935 (1982).

2. On appeal, petitioner's convictions were affirmed, except that the conspiracy conviction under 21 U.S.C. 846 was vacated on the ground that it was a lesser included offense of 21 U.S.C. 848, the continuing criminal enterprise charge. *Webster*, 639 F.2d at 182.

3. In April 1985, petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. On June 5, 1986, the district court denied the motion. Petitioner filed an untimely notice of appeal. The court of appeals dismissed the appeal for lack of jurisdiction. See Government Answer to Section 2255 Motion at 6 (June 5, 1989).

4. On April 13, 1989, petitioner filed another motion under 28 U.S.C. 2255 challenging his convictions. In that motion, petitioner raised four challenges to the continuing criminal enterprise (CCE) and RICO convictions, alleging that they were based on insufficient evidence and erroneous jury instructions. Petitioner also claimed that he had not received effective assistance of counsel at trial and on

appeal. The district court rejected those claims and denied the motion.

The court held that petitioner waived his four challenges to the CCE and RICO convictions by failing to raise them on direct appeal. The court observed that petitioner conceded that these challenges should have been raised on direct appeal. Pet. App. 56a. Petitioner contended, however, that the challenges could be raised in a collateral attack because the failure to raise them on appeal had resulted from the ineffective assistance of counsel. The court rejected that contention.

The court determined that the "cause and actual prejudice" standard enunciated in *United States* v. *Frady*, 456 U.S. 152 (1982), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), governed "the determination of whether such direct challenges can be raised on collateral attack." Pet. App. 57a. The court then determined that claims of ineffective assistance of counsel may not be used to establish "cause" under that standard. "Any prejudice resulting from a violation of the right to effective counsel must be treated on a distinct constitutional claim for relief." *Ibid.* A claim of ineffective assistance "may not properly be used for the secondary purpose of establishing 'cause' so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal." *Id.* at 57a-58a. To hold otherwise "would clearly violate 'society's legitimate interest in the finality of the judgment' of conviction" (*id.* at 58a (quoting *United States* v. *Frady*, 456 U.S. at 164)). The court accordingly denied petitioner's motion to vacate "as to the four grounds which [petitioner] himself admits could have been raised on appeal." Pet. App. 58a.

The court then rejected petitioner's claims of ineffective assistance of counsel on the merits. The court recognized that those claims were governed by *Strickland* v.

Washington, 466 U.S. 668 (1984). Pet. App. 58a. Based on a "review of the entire record in this case," the court concluded that "[petitioner] received the assistance of a highly experienced criminal defense attorney whose representation in the instant case has met the recognized standards of quality and effectiveness." *Id.* at 59a.

5. The court of appeals affirmed. The court agreed (Pet. App. 63a) that petitioner had "failed to make a showing of cause and actual prejudice as required by *United States* v. *Frady*, 456 U.S. 152 (1982)." The court further held that "[i]neffective assistance of counsel may not be used to establish cause under the *Frady* test." Pet. App. 63a. As to petitioner's claims of ineffective assistance of counsel, the court found "no error" in the district court's conclusion that "[petitioner] had not met the burden imposed by *Strickland* v. *Washington*." *Ibid.*

ARGUMENT

1. Petitioner renews his contention (Pet. 4-5) that he was deprived of his Sixth Amendment right to effective assistance of counsel. He argues (Pet. at 5) that the ineffective assistance consisted of "a stipulation by counsel mid-trial to an essential element of the [RICO] offense that the Government may not have proved," namely that the 1508 Club was an enterprise engaged in activities that affected interstate commerce. The courts below correctly refused to grant relief on this basis under 28 U.S.C. 2255.

First, petitioner's motion under 28 U.S.C. 2255 constitutes an abuse of the writ under this Court's recent opinion in *McCleskey* v. *Zant*, No. 89-7024 (Apr. 16, 1991). Petitioner filed an earlier motion under 28 U.S.C. 2255 that the district court denied; petitioner took an untimely appeal from that ruling, which was properly dismissed by the court of appeals. Petitioner does not explain why he could not have

raised his claim of ineffective assistance of counsel in the earlier motion and appealed any adverse ruling in a timely fashion. Petitioner's unexplained failure to do so bars relief under *McCleskey* v. *Zant*.

Second, petitioner's claim of ineffective assistance of counsel is without merit in any event. The district court rejected that claim based on a review of the entire record, Pet. App. 59a, and the court of appeals found no error in the district court's determination, *id.* at 63a. Petitioner provides no basis for setting aside the lower courts' holdings.

Competent counsel frequently stipulate to particular issues on which the evidence is not subject to dispute and which do not affect the theory of defense. The fact that the issue is an element of the offense does not make it improvident for counsel to stipulate to the issue.

Petitioner does not suggest any reason why the stipulation in this case was improper. He does not contend that the issue was one on which counsel could have mounted an effective defense. Rather, his claim is simply that the government may not have been able to prove the element of interstate commerce, and that if proof of that element had failed, petitioner would have been entitled to acquittal on the racketeering count (Pet. 5). The interstate commerce element is not an exacting one, however, and in light of the fact that the racketeering enterprise was a tavern and liquor store, it is inconceivable that counsel could have mounted an effective defense on the theory that the enterprise was not engaged in interstate commerce. There is therefore no reason to believe that counsel's decision to stipulate on that issue denied petitioner the effective assistance of counsel.

2. Petitioner also renews his contention (Pet. 5-6) that there was insufficient evidence to support his conviction under 21 U.S.C. 848. Petitioner argues that the evidence was sufficient only to show that he supervised four persons,

not five persons, as required for the offense. That argument does not warrant further review.

On direct appeal, the court of appeals rejected petitioner's challenge to the sufficiency of evidence supporting his conviction under ~~28~~ 21 U.S.C. 848. *Webster*, 639 F.2d at 181. Petitioner does not explain why further review of that challenge would be appropriate.[1] Nor does petitioner explain why he did not timely pursue that argument in his previous 2255 petition. In any case, the evidence at trial showed conclusively that, even without counting Herbert Leon Johnson, petitioner supervised many more than five persons. See Government Answer to Section 2255 motion at 14-20 (June 5, 1989). Further review of petitioner's fact-bound claim is unwarranted.

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[1] To the extent petitioner claims that his attorney improperly failed to raise the specific argument regarding the sufficiency of the evidence raised here, the court of appeals properly held (Pet. App. 63a) that "[i]neffective assistance of counsel may not be used to establish cause under the *Frady* test." As the district court reasoned, "allegations of ineffective assistance of counsel may not properly be used for the secondary purpose of establishing 'cause' so as to afford defendant a second chance at appellate review of any and all issues that could have been raised during the direct appeal" (Pet. App. 58). Such "an application of the 'cause and actual prejudice' standard would clearly violate 'society's legitimate interest in the finality of the judgment' " (Pet. App. 58a (quoting *United States* v. *Frady*, 456 U.S. 152, 164 (1982)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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